No. 10325

In The United States Circuit Court of Appeals

For the Ninth Circuit

H. HARRY MEYERS,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Reply Brief of Appellant

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BERTIL E. JOHNSON,
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INDEX

	Pages
SUMMARY OF THE EVIDENCE	1
ARGUMENT	4
Admission of evidence in reference to plaintiff's Exhibit 98 (Assignment of Errors 1 and 2)	4
Admission of evidence of witness, Ernest A. Troeger (Assignment of Error 4)	11
CONCLUSION	14

AUTHORITIES CITED

TABLE OF CASES:

Bates v. People, 151 U. S. 149, 238 L. Ed. 196	9
Buena Vista County v. Iowa Falls & SCR Co., U. S. 165, 28 L. Ed. 680	9
Butler v. Watkins, VC *Wall*, 456, 20 L. Ed. 629	13
Castle v. Bullard, 23 How. 172, 16 L. E. 424	13
Chitwood v. U. S., (CCA), 153 Fed. 551	13
Consolidated Grocery Co. v. Hammond, 175 Fed. 641 (CCA Fla.)	6
Druyer v. Dunbar, 5 Wall (US) 318, 18 L. Ed. 489	10
Exchange Bank v. Mass., 79 CCA 278, 149 Fed. 340	13
Frank V. Frank, 209 Ala. 630, 96 So. 859, 32 A.L.R. 1478	10
Freeborn, William, et al v. H. Martin Smith, 2 Wall (69 U. S.) 160, 176; 17 L. Ed. 922 Nevada	7
Grand Tower Min. & Mfg. Co. v. Phillips, 23 Wall (U. S.) 471, 23 L. Ed. 71	10
Gregory Consol. Mining Co. v. Starr, 141 U. S. 222, 35 . Ed. 715	9
Hegler v. Faulkner, 153 U. S. 109, 38 L. Ed. 653	9
Herron v. Dater, 120 U. S. 464, 30 L. Ed. 748	9
Ins. Co. v. Guardiola, 129 U. S. 642, 32 L. Ed. Ed. 809	9

Pages

Jennings v. U. S., (CCA) Ga.), 73 Fed. (2) 470, 473 ---- 7

Lucas v. U. S., 163 U. S. 612, 41 L. Ed. 282, 16 S. Ct. 1168 ---- 8

Maxwell v. Wilkerson, 113 U. S. 656, 28 L. Ed. 1037 ---- 9

Nash v. Nunn Title Ins. Co., 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753 ---- 10

Nevada Co. v. Farnsworth, 102 Fed. 573 (Utah) ---- 6

Ownings v. Hull, 9 Pet. (U. S.) 607, 9 L. Ed. 246 ---- 10

Peralta v. U. S., 3 Wall (U. S.) 434, 18 L. Ed. 221 ---- 9

Queen v. Hepburn, 7 Cranch (U. S. 290) 3 L. Ed. 348 ---- 8

Security Trust Co. v. Robb, 142 Fed. 78 (CCA N. J.) ---- 6

Thomas v. U. S., 156 Fed. 897, 911 (CCA 8) ---- 12

Title Guaranty & S. Co. v. Bank of Fulton, 89 Ark. 471, 117 S. W. 537 ---- 10

U. S. ex rel Tennessee Valley Authority v. Neal, et al, 45 Fed. Supp. 382 ---- 7

Underhill Criminal Evidence, 3rd Edition, P. 196, Par. 152 ---- 12

Underhill Criminal Evidence, 3rd Edition, P. 197, Par. 152 ---- 12

Wood v. U. S., 16 Pet. 342, 10 L. Ed. 987 ---- 13

Vicksburg v. O'Brien, 119 U. S. 99, 30 L. Ed. 299 ---- 9

TEXTBOOKS

20 American Jurisprudence P. 521, Par. 608 ---- 8

20 American Jurisprudence, P. 462, Par. 548 ---- 8

20 American Jurisprudence, P. 460, Par. 544 ---- 8

20 American Jurisprudence, P. 769, Par. 912 ---- 9

20 American Jurisprudence, P. 807, Par. 958 ---- 9

Words & Phrases, P. 178 ---- 7

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SUMMARY OF THE EVIDENCE

Space does not permit a complete summary of the evidence nor an opportunity to point out all of the statements of the appellee which do not conform strictly with the facts herein; therefore, we shall content ourselves in briefly setting forth the evidence relating to some of the Assignments of Errors.

It may be said at the outset that many of the statements made by counsel for the appellee in his "Summary of Evidence" are actually the construction placed upon the evidence by counsel for the appellee and do not reflect the full and complete evidence. In this case, as in many criminal cases, there was a sharp conflict of evidence.

The first indictment in this case was returned, as set forth in the appellee's Brief, on October 20, 1937, and two days thereafter a receiver was appointed in the State Court. G Ex. 98 was dated June 2, 1937 (Tr. 866). The particular indictment on which the appellant Meyers was tried was returned December 2, 1938, and was the second indictment returned involving the identical violations charged in this particular case. The jury in the first trial on this particular indictment disagreed as to the defendant Meyers while convicting four others (Tr. 70). During the trial of that case no evidence was submitted on behalf of the defendant Meyers, the case having been submitted to the jury after the close of the Government's case (Tr. 1389 and 1390). G Ex. 8 was a preliminary agreement (Tr. 1329) executed March 16, 1934, but that said agreement was later superseded by an agreement between the parties, and all of the contracts, as evidenced by G Ex. 8, were to have been destroyed, which destruction was to act as a recission (Tr. 1331). About the 1st of April, 1934, it was agreed between Meyers, Markowitz, Simons and Broome that the Oil Company was to buy the leases for $65,000.00 and execute a note therefor to the Development Com-

pany. Meyers and Broome were to drill the well, using the $65,000.00, as evidenced by the note, and such other moneys to be furnished by Meyers as may be necessary to drill the well. Meyers was not to have anything to do with the selling of leases or the oil company (Tr. 1330). It was in conformity with that agreement that the books of the corporation and oil company were corrected to show the true agreement between Meyers, Markowitz, Simons and Broome. The Troeger transaction (Assignment of Error No. 4), to which the witness Ernest A. Troeger was allowed to testify, took place between the years 1919 and 1923, the last transaction having taken place at least eleven years prior to the time that H. Harry Meyers met Broome. The testimony of Troeger was introduced solely on the ground that it would establish evidence tending to show the intent of H. Harry Meyers in this case. The record discloses the following:

> "MR. HILE: I can state the purpose, if your Honor please.
>
> THE COURT: Similar conduct and acts, for the purpose of establishing intent in this case?
>
> MR. HILE: Yes, that is one of the aspects of the whole situation.
>
> MR. SIMON: I object to it as being too remote, if that is the purpose. * * * * * *
>
> MR. HILE: The purpose is to show that the defendant Meyers promised this witness' father employment for his lifetime; * * *. It goes to show what relation defendant Meyers had to

the Translux Corporation, with reference to the notes and transactions as a whole, * * * and propose further to show by contract that the witness' father was ultimately put out of the picture.

THE COURT: The only concern of the Court is as to whether or not this matter is too remote for the purpose of proving intent in this case. * * * The objection will be overruled. * * * The jury is instructed, of course, that it is admitted not to prove any issue in this case, other than the bearing it might have, if any, upon the element of intent, which is an important element in this case."

Tr. 911, 912 and 913.

The evidence in reference to G Ex. 98, Assignment of Errors 1 and 2, is discussed in the argument and will be further referred to in succeeding pages of this brief.

ARGUMENT

Assignments of Errors 1, 2, 5 and 7, inclusive

These are discussed on pages 27 to 44 inclusive of our opening Brief, and on pages 42 to 50 inclusive, 56, 57, 62 and 63 of appellee's Brief. The appellee has argued that G Ex. 98 was admitteed in evidence because the defense had introduced D Ex. A-68, A-69, A-71 and A-77, and states in his Brief at page 43 that such exhibits were communications by Strauss to third persons. A-68 was a letter witten by Strauss to Meyers enclosing a letter Strauss had written to his son and was a communication issued by Strauss with the intention

that Meyers should note the contents of that letter, which was enclosed (Tr. 699). A-69 is a letter addressed to Meyers from Strauss in which he enclosed copy of Weinfeld letter (Tr. 70). A-71 is a letter directed to August Fritze in which he (Strauss) sets forth the agreement entered into between Meyers, Strauss and Fritze and negotiations on the Golden Gate Bridge (Tr. 721). A-77 is a letter addressed to H. Harry Meyers, written by Strauss (Tr. 731).

John Sparks, through whom these exhibits were introduced, was called as a witness by the Government and testified that he was familiar with the Strauss' files. Sparks testified: "I knew what he (Meyers) was doing only from letters." (Tr. 682.)

It must be borne in mind that Sparks was a Government witness called to testify in its case in chief and that the Government was attempting to show by Sparks that the appellant had little or nothing to do with Strauss. All of said Exhibits A-68, A-69, A-71 and A-77, and incidentally there were many more, tended to show what should have been reflected in the Strauss' files. The letters introduced by the defendant were proper cross examination and became material exhibits to show what the Strauss file contained and to disprove the contention of the Government through the witness Sparks that Meyers had little or nothing to do with Strauss. The matter was opened up by the Government in its case in chief. G Ex. 98 was a letter written by Strauss to a Government investigating officer a short time before the first indictment was returned in this case. By

the wildest stretch of the imagination it cannot be said that G Ex. 98 was proper and competent evidence and not reversible error. The only grounds on which the appellee suggests that G Ex. 98 was competent was because of the introduction of defendant's Exhibits A-68, A-69, A-71 and A-77. G Ex. 98 was purely hearsay of the rankest sort and was reversible error.

In an action for conspiracy, statements made in a letter written by a third person, not charged as a conspirator to be an agent of defendants, are mere hearsay.

> *Consolidated Grocery Co. v. Hammond*, 175 Fed. 641 (CCA Fla.).

The contents of a letter written to a plaintiff by a third person not connected with defendant which purports to contain a statement made to a writer by defendant are inadmissible as hearsay.

> *Security Trust Co. v. Robb*, 142 Fed. 78 (CCA N.J.)

A letter between third parties reciting statements said by the writer to have been made to him by defendant is not admissible against defendant.

> *Nevada Co. v. Farnsworth*, 102 Fed. 573 (CCA Utah).

> "The single Bill of Exceptions in the case is to the refusal of the Court to receive certain letters in evidence. The defendants were charged to have been partners with one George N. Shaw, or to have held themselves out to the public as

such. This was the only issue of the case. To rebut the plaintiff's proof, the defendants offered correspondence between themselves, and some letters to them by one Ira Eaton, their agent. It is hard to perceive on what grounds the parties should give their private conversations or correspondence with one another or their agent to establish their own case, or show that they had not held themselves out to the public as partners of the deceased."

William Freeborn, et al v. H. Martin Smith, 2 Wall. (69 U. S.) 160, 176; 17 L. Ed. 922, Nevada.

"The reception of oral statements, letters or reports of petitioner's geologist, now deceased, if proven and authenticated, would violate more than one rule of evidence. An insuperable barrier would be the hearsay rule and moreover the oral statement, letter or report the answer seeks to bring forth could at most have been the act of an agent dealing with his principal and without semblance of conclusiveness and certainly not an admission against interest. (Citing authorities.) In the absence of the witness the petitioner would be powerless to show the methods employed in arriving at the conclusions or opinion and like matters, all of which enter into the reason for the rule which excludes the testimony of deceased witnesses whom the adverse party has not once had an opportunity to cross examine."

U. S. ex rel Tennessee Valley Authority v. Neal, et al, 45 Fed. Supp. 382.

"Hearsay is that kind of statement which does not admit of testing by cross examination."

Words and Phrases, page 178.

Jennings v. U. S. (CCA Ga.), 73 Fed. (2) 470, 473.

The letter introduced as G Ex. 98 was an effort on the part of the Government to prove their case in chief by indirection when they could not make proof by direct evidence. It was an unsworn statement made out of Court by a deceased person expressing an opinion as to the defendant and was introduced without benefit of the writer being present in Court for cross examination.

> "In the absence of statute, the death of a declarent is not in itself a ground for invoking an exception to the hearsay rule which renders unsworn statements admissible in evidence."
>
> *20 Am. Jur.* 521, Par. 608;
>
> *Lucas v. U. S.*, 163 U. S. 612, 41 L. Ed. 282, 16 S. Ct. 1168;
>
> *Queen v. Hepburn*, 7 Cranch (U. S.) 290, 3 L. Ed. 348.
>
> "Ordinarily, a declaration of an opinion or conclusion is inadmissible if the declarent would not have been permitted to state it as a witness."
>
> *20 Am. Jur.* 462, Par. 548.
>
> "The hearsay rule excludes in general statements made out of Court offered as proof of the facts asserted."
>
> *20 Am. Jur.* 460, Par. 544.

The Government's Ex. 98 was written by Strauss to a third party in a matter in which Meyers was an entire stranger.

"Generally speaking, the rights of an individual cannot be effected by written statements of persons who act in an unofficial capacity in respect to matters to which he is a stranger. As to him such rights are inadmissible."

20 Am. Jur. 769, Par. 912;

Hegler v. Faulkner, 153 U. S. 109, 38 L. Ed. 653;

Bates v. People, 151 U. S. 149, 38 L. Ed. 106;

Ins. Co. v. Guardiola, 129 U. S. 642, 32 L. Ed. 809;

Herron v. Dater, 120 U. S. 464, 30 L. Ed. 748;

Vicksburg v. O'Brien, 119 U. S. 99, 30 L. Ed. 299;

Maxwell v. Wilkerson, 113 U. S. 656, 28 L. Ed. 1037;

Buena Vista County v. Iowa Falls & SCR Co., 112 U. S. 165, 28 L. Ed. 680;

Peralta v. U. S., 3 Wall. (U. S.) 434, 18 L. Ed. 221.

"Generally, correspondence of persons where offered, as evidence of facts stated therein must be excluded under the general principal respecting *res inter alios acta*."

20 Am. Jur. 807, Par. 958.

Gregary Consol. Mining Co. v. Starr, 141 U. S. 222, 35 L. Ed. 715;

Grand Tower Min. & Mfg. v. Phillips, 23 Wall. (U. S.) 471, 23 L. Ed. 71;

Druyer v. Dunbar, 5 Wall. (U. S.) 318, 18 L. Ed. 489;

Frank v. Frank, 209 Ala. 630, 96 So. 859, 32 A. L. R. 1478.

"Unless the party against whom the communications are tendered is in some way connected therewith or knew and approved their utterance."

Ownings v. Hull, 9 Pet. (U. S.) 607, 9 L. Ed. 246;

Title Guaranty & S. Co. v. Bank of Fulton, 89 Ark. 471, 117 S. W. 537;

Nash v. Nunn Title Ins. Co., 163 Mass. 574, 40 N. E. 1039, 28 L. R. A. 753.

Government's Ex. 98, being an unsworn communication uttered out of Court, made by a deceased person not present for cross examination to a stranger to the defendant, constituted hearsay under all the rules of hearsay evidence and was of such a nature as to be highly prejudicial to the rights of the defendant. It might respectfully be noted, parenthetically, that this letter was not introduced against the defendant in the first trial in which the jury disagreed. It can reasonably be said then that this hearsay evidence was the final prejudicial error which caused an adverse verdict to be rendered against the defendant.

Assignments of Error No. 3, 8, 9, 10 and 14

These Assignments of Error are discussed in our opening Brief and we shall not take the space to discuss them further here.

Assignment of Error No. 4 — the Troeger transaction

The appellee argues that the true ground on which the evidence was offered and upon which it was admitted was to show that Meyers was only a promoter and not a financier, but, as the record shows and as has been set forth on page 3 of this Brief, the evidence was admitted on one ground and that ground was to show intent. It must be remembered that this evidence was admitted in the Government's case in chief, not as rebuttal, and was admitted on the ground as above set forth that it had some bearing on Meyers' intent. Therefore, the only ground on which it was admitted was to show a similar scheme and device bearing upon intent in this case. It must also be remembered that the transactions to which Troeger testified were some fourteen years prior to the alleged violation of law charged in this indictment. The appellee argues in his Brief that transactions occuring some fourteen years prior to the offense of the crime charged in this indictment should be admitted to show in their case in chief that Meyers then held himself out as a philanthropist, a great and experienced man with high ideals and motives, a financier, a multimillionaire, etc. Had the

acts complained of by appellee been at all near the time complained of in the indictment, it might be conceivable that the evidence might have been admissible to show intent, but certainly for no other purpose. The most that can be said for the Government's contention is that the acts must have been committed at about the same time as that charged in the indictment.

> "* * * In order that a collateral crime may be relevant as evidence it must be connected with the crime under investigation as part of a general and composite transaction."
>
> *Underhill on Criminal Evidence, Third Edition*, P. 196, Par. 152.

> "* * * On the other hand, if from remoteness in point of time, or from distance in point of place, or by reason of intervening circumstances of whatever nature, the court can see that there is no necessary connection between the two crimes, evidence of the independent and disconnected crime should be rejected. * * *"
>
> *Underhill on Criminal Evidence, Third Edition*, P. 197, Par. 152.

The strongest rule supporting appellee's contention is shown in *Thomas v. U. S.*, 156 Fed. 897, 911 (CCA 8):

> "Nothing is better settled in the law of evidence in any case involving fraudulent intent than that other acts and dealings of the accused of a kindred character to those charged in the case in hand and *performed at or about the same time are admissible* to illustrate and establish the intent or motive in the particular act directly in judgment."

Wood v. U. S., 16 Pet. 342, 10 L. Ed. 987;

Chitwood v. U. S. (CCA), 153 Fed. 551;

Exchange Bank v. Mass., 79 CCA 278, 149 Fed. 340.

"If a motive exist prompting to a particular line of conduct, and it be shown that in pursuing that line a defendant has deceived and defrauded one person, it may justly be inferred that similar conduct towards another, *at about the same time* and in relation to a like subject, was actuated by the same spirit."

Butler v. Watkins, 13 Wall. 456, 20 L. Ed. 629.

"Similar fraudulent acts are admissible in cases of this description, *if committed at or about the same time,* and when the same motive may reasonably be supposed to exist, with a view to establish the intent of the defendant in respect to the matters charged against him in the declaration."

Castle v. Bullard, 23 How. 172, 16 L. Ed. 424.

CONCLUSION

Appellee in his Brief has attempted to justify the errors which were committed by the trial court and it is significant to note that at the conclusion of most of his discussions of the Assignment of Error he uses this language: "In any event, however, if there is error in the admission of this exhibit it was harmless," which can only lead one to believe that counsel for the appellee is convinced that the Assignments of Error claimed by the appellant were well taken and were error. The only question he raises is whether or not they were prejudicial.

It is significant to note that in the first trial of this case the jury disagreed and these errors were not committed in that trial. The logical conclusion must be that it was the commission of these errors and the evidence thus erroneously admitted which were the factors which controlled the jury in arriving at a verdict of guilty in this case. Certain it is that the Government's Ex. 98 was highly prejudicial for the reasons set forth in our Briefs and particularly when one reads carefully that letter and notes that the writer thereof comments on practically every charge of misrepresentation that was made in the indictment.

The Troeger transaction admittedly was offered to prejudice the jury and it, like G Ex. 98, covered practically every alleged misrepresentation charged in the indictment.

It is easy for appellee to say by a mere reading of the cold record that such errors were harmless, but we are of the opinion that only the jury could say that such evidence was or was not the factor, or an accumulation of factors, which caused them to arrive at the verdict returned.

We respectfully submit, therefore, that the errors complained of were prejudicial and reversible errors, that the appellant herein did not receive a fair trial, and that the judgment of the lower Court should be reversed and the cause remanded for a new trial.

Respectfully submitted,

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